Appalachian Machine and Rebuild Company *and* Oil, Chemical and Atomic Workers International Union, AFL–CIO. Cases 11–CA–16069, 11–CA–16236, and 11–RC–6013

July 28, 1995

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On May 5, 1995, Administrative Law Judge Albert A. Metz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Appalachian Machine and Rebuild Company, Dublin, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DIRECTION

It is directed in Case 11–RC–6013 that the Regional Director for Region 11 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots of Larry Breeden, Jim Kelly, and Melvin Goad. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

[1] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) by threatening employees about their union activities, giving them the impression of surveillance, and coercively interrogating the employees. In addition, no exceptions were filed to the judge's dismissal of the Respondent's alleged unlawful discharge of employees Jay Puckett, Tim Puckett, and Thomas Wright.

Donald R. Gattalaro, Esq., for the General Counsel.
Clinton S. Morse, Esq. and *Thomas M. Winn III, Esq. (Woods, Rogers & Hazlegrove)*, of Roanoke, Viriginia, for the Respondent Employer.
Steve Gentry, of Radford, Viriginia, for the Charging Party Petitioner.

DECISION

STATEMENT OF THE CASE

ALBERT A. METZ, Administrative Law Judge. These consolidated cases were heard at Pulaski and Radford, Virginia, on January 31 through February 3, and March 13, 1995. The original charge in Case 11–CA–16069 was filed by Oil, Chemical, and Atomic Workers International Union, AFL–CIO (the Union), on June 8, 1994.[1] Amendments to the charge were filed on August 26 and September 1 and 27. The charge in Case 11–CA–16236 was filed by the Union on October 5. A complaint and amended complaints issued on August 31, September 2, and October 18, respectively. A consolidated complaint and notice of hearing issued on November 22. The primary issues in the complaint case are various allegations of 8(a)(1) conduct, and whether Respondent violated Section 8(a)(3) of the Act by the termination of four employees.

A petition was filed April 4 in Case 11–RC–6013. An election was conducted May 20 pursuant to a stipulated election agreement. Challenges to several voters were made by the Petitioner and the Board agent conducting the election. On August 31, the Regional Director for Region 11 issued a report on objections and challenges and directed that a consolidated hearing be held on the challenges along with the unfair labor practice charges.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, as of June 1994, is a Virginia corporation with an office and place of business at Dublin, Virginia, where it is engaged in the manufacture of mobile trash containers. During the calendar year preceding the issuance of the consolidated complaint, Respondent sold and shipped finished products valued in excess of $50,000 from its Dublin, Virginia facility directly to customers located outside the Commonwealth of Virginia. The complaint alleges, Respondent admits, and I find that Respondent has been at all times material an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES[2]

A. *Background*

In March 1994 Respondent was a partnership of owners Jerry Jones and Eddie Farmer. About March 14, some of Re-

[1] All dates are in 1994 unless otherwise stated.

[2] Amendments to the pleadings—counsel for the General Counsel amended the complaint during the course of the hearing as follows: (1) The year in the first line of par. 7 was amended to read ''1993.'' *Continued*

spondent's plant employees became interested in learning about union representation. Welder Jay Puckett contacted the Union and a meeting of employees was held at a local Hardee's restaurant. A petition expressing the employees' desire for collective representation was signed by the workers at this meeting.

On March, 25, Larry Breeden and Jim Kelly went to Respondent's Dublin, Virginia plant and talked to Respondent's president, Jerry Jones, about employment. After they filled out job applications, Jones told the men that the Company needed someone to dismantle machinery and do some construction at the Dublin plant. Breeden had building skills and Kelly was a trained carpenter. They were hired to start work on Monday, April 4, disassembling a paint monorail system at the Employer's nearby Parrott, Virginia facility. Employees only worked at Parrott when product painting was required. The paint equipment was to be transferred to the Dublin facility so all manufacturing operations would be done at one location. The two men worked the week of April 4 completing the disassembly work at the Parrott facility and then went to the Dublin plant to work the remainder of their time with the Company.

On April 4 the Union filed a petition for a representation election with the Board's Regional Office. On April 5 Jones and Farmer were told by Supervisor Robert Goad that there was a rumor the employees were seeking union representation. The rumor was confirmed when on April 6 or 7 Respondent received a mailed copy of the petition for election sent from the Regional Office.

Jones and Farmer hired an experienced labor law firm to assist them in conducting the Company's side of the campaign. As part of its services the firm gave all supervisors training and/or written materials on how to deal with the election situation.

A stipulation for the election was agreed upon by the parties and an election was held on May 20. The election resulted in a tie vote. Because of challenged ballots the final results are unknown.

The week following the election the Company announced temporary partial layoffs of employees in the welding and assembly departments. Employees in the other two plant departments of machine shop and maintenance were not effected by the layoff.

The Union filed charges alleging various violations of Section 8(a)(1) of the Act had occurred both before and following the election. The charges also allege that the Company violated Section 8(a)(3) of the Act when employee Melvin Goad was terminated while on sick leave, and employees Tim Puckett, Jay Puckett, and Thomas Wright were constructively discharged after the election. The Employer denies all of the allegations in the charges. I find that the Respondent did commit some of the acts alleged as violations of Section 8(a)(1) of the Act. I further find the Respondent did not violate Section 8(a)(3) of the Act relative to the four employees.

(2) The 8(a)(1) threat allegation in par. 7(a) referring to ''March, 1994'' was deleted. (3) The 8(a)(3) discharge allegations concerning ''Andy Hall–May 13, 1994'' and ''Aaron Hogston–May 6, 1994'' were deleted from par. 9 of the complaint. The Respondent amended its answer to admit all allegations of par. 6 (which alleges supervisory status of several individuals) with the single exception of ''Thomas Hubbard-Manager.'' His supervisory/agency status remains denied.

B. *The Alleged Independent Violations of Section 8(a)(1) of the Act*

1. Alleged statements by Supervisor Cindy Jones

Employee Larry Breeden started working for Respondent in April. Shortly thereafter he began dating Cindy Jones. Cindy is the daughter of owner Jerry Jones. She is also the office manager for the Respondent and an admitted supervisor within the meaning of the Act. Eventually Breeden and Cindy stopped dating. Cindy stated that Breeden was very upset by their breakup and continued to call her and not leave her alone. Breeden's sister, Catangelinia Breeden Pagan, testified it was Cindy who kept calling and bothering Breeden. Breeden characterized the breakup as a mutual agreement. Breeden eventually quit his employment with Respondent on August 5. Cindy, in uncontroverted testimony, stated that on his last day of work as he was leaving, Breeden pointed his finger at her and said, ''You'll be sorry.''

Breeden testified that in late April he was on a date with Cindy. She allegedly told Breeden that if the Union came in her father would shift money around, close the business, and open under a new name. Cindy denied ever making such a statement.

Breeden recalled another incident while on a date with Cindy. Breeden mentioned that the welders did not have much work to do. This concerned him because he and fellow maintenance employee, Jim Kelly, likewise were short on work. Cindy told him the Company had work but they were not taking it in because they were going to ''downsize'' some of the employees. Cindy did not state how she learned of this information. This incident was also denied by Cindy Jones.

This later event was not specifically alleged in the complaint. In footnote 9 of his brief, counsel for the General Counsel, moved to amend the complaint to include an allegation in conformity with this incident. The theory being the statement implied that Respondent would soon be discharging some prounion employees. The evidence on this conversation was received without objection by Respondent and was fully litigated. I, therefore, grant counsel for the General Counsel's motion to amend the complaint to include this additional 8(a)(1) allegation. *Pincus Elevator & Electric Co*., 308 NLRB 684 (1992); *Lion Knitting Mills Co*., 160 NLRB 801, 802 (1966).

Breeden's credibility came under heavy attack during the hearing. Over the objection of counsel for the General Counsel I permitted Respondent's counsel to present evidence of Breeden's character for veracity. Fed.R.Evid. 608; 3 Weinstein, Evidence § 608 [03] (1981); McElhaney, McElhaney's Trial Notebook 208 (Sec. of Litigation, American Bar Association, 3d ed. 1994); Louisell and Miller, Federal Evidence, § 304 at 215–224 (1979). The result was several witnesses who testified that Breeden's reputation for telling the truth was poor. Some of these witnesses were fellow employees. Two were social and/or business acquaintances of Breeden who had no association with Respondent.

One of the independent witnesses, Stewart Quesenberry, reported in uncontroverted testimony that Breeden had approached him in the courthouse hallway before his testimony. Breeden asked Quesenberry not to hurt him with his testimony as Breeden had a bunch of money riding on the out-

come of the case. This is a peculiar statement considering Breeden was not an alleged discriminatee and would not be entitled to backpay compensation. In rebuttal of the testimony of these numerous witnesses, the Government had Breeden's sister, Catangelinia Breeden Pagan, testify that she had found him to be a truthful person.[3]

Considering Breeden's demeanor, his reputation for veracity, the failure of another employee witness to confirm his testimony (see sec. 3a below), and his inability to provide evidence corroborative of some of his testimony (see fn. 6), I find him generally to be an inaccurate reporter of what he observed. In contrast, Cindy Jones was a credible witness who was certain and forthright in her testimony. I credit Cindy's denial that she made the statements attributed to her by Breeden. I shall dismiss these allegations of the complaint.

2. Creating the impression of surveillance

Employee Tim Puckett testified that in April Supervisor Jack Sarver approached him in his work area. Sarver told him to be careful, but that he was not pointing the finger at Puckett. When Puckett asked what Sarver was talking about, he recalled Sarver saying, ''You're the organizer.'' Sarver denied ever saying anything like the alleged statement.

I found Tim Puckett's testimony regarding the conversation to be credible. He was detailed about the encounter and gave the impression that he had been highly offended by the accusations made. In contrast, the general denial by Sarver was not convincing. Based on the demeanor of these two witnesses while testifying about this event I credit Puckett's version of the dialogue. I find that Supervisor Sarver's statement regarding asserted knowledge of Puckett's union activities and warning him to be careful is a violation of Section 8(a)(1) of the Act.

3. Alleged interrogations concerning union activities

a. *Larry Breeden—April 12*

Larry Breeden testified that, on April 12, he and Jim Kelly were discussing a materials list with Jerry Jones in his office. Jones allegedly told the two employees they would be eligible to vote in the election and ''kindly [sic] asked about our views on the Union.'' According to Breeden Jones also ''just kindly [sic] keep our eyes and ears open what was going on out in the shop, because the shop was more or less divided into two groups.'' (Tr. 30.)

Jones categorically denied ever interrogating the two men about their union sympathies or asking them to keep alert to what was happening in the shop.

At the time of the hearing Jim Kelly had quit work for the Respondent and moved to a different area of the State. He was subpoenaed to testify for the Respondent. Kelly remembered a conversation where Jones told him and Breeden the Union had filed a petition. He denied ever being interrogated by Jones about anyone's union activities or being told to keep his eyes and ears open in the plant. Kelly was a very credible witness who impressed me by his demeanor and unbiased testimony. He has no association with the Employer and is a friend of Breeden. Kelly answered questions in a conscientious manner. I particularly credit his denials that the conversation among the three men involved any interrogation or suggestion of surveillance by Jones. Likewise Jones was definite and believable in his refutation. In contrast Breeden, as already discussed, did not impress me as a scrupulous witness. I therefore shall dismiss this allegation of the complaint.

b. *Tim Puckett—early April*

Employee Timothy Puckett testified that in early April he had a conversation at his work station with Supervisor Robert Goad. Goad stated he thought the Union might do more harm than good. Goad then asked Puckett what he thought of the Union. Puckett declined to give an opinion as he had been advised earlier by fellow employee, Melvin Goad, Robert's brother, that the supervisor may have a small tape recorder concealed in his pocket. Robert Goad denied he ever asked Tim Puckett his opinion of the Union. He likewise denied ever carrying a concealed tape recorder.

I credit Tim Puckett's version of the conversation. He was definite and detailed in his recollection. Goad's demeanor and simple general denial was less impressive. Puckett testified he did not hide his support for the Union and had union stickers on his thermos and welding hood. Whether these had been observed by Goad is unknown. Nonetheless Supervisor Goad initiated the inquiry and was clearly trying to learn Puckett's sympathies concerning the Union. There was no showing that the two men enjoyed any close relationship nor that there was a lawful purpose for the question. In making this evaluation, I have also considered as a significant surrounding event the impression of surveillance and the warning involving Tim Puckett discussed above. Under all the circumstances, I find this inquiry of union sympathy was made and that it violated Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

c. *Thomas Wright—April 18*

Thomas Wright testified that, on or about April 18, he was approached at his work station by Supervisor Adam Bruce. Wright was uncertain of the details of the conversation, but did recall Bruce asked him what he thought of the Union. The Respondent did not have Bruce testify to deny the interrogation. No explanation was offered for his absence. I draw an adverse inference from the Respondent not producing Bruce to testify. That inference is that were he called to testify, his testimony would be contrary to the Respondent's denial of this allegation. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988).

I credit the uncontroverted testimony of Wright that he was questioned by Sarver about his union sympathies. While the details of this encounter are vague, the Respondent has chosen not to refute or explain the nature of the questioning.

[3] I have also considered Pagan's testimony that Cindy Jones on one occasion asked Larry Breeden which employees were going to vote for the Union. This statement was not alleged as a violation and, more importantly, was not corroborated by Larry Breeden. In light of the uncorroborated nature of the statement, I do not give it any significant evidentiary weight in reaching the credibility findings I have made relative to alleged violations of the Act.

No lawful purpose was offered for such a query. Under a totality of the circumstances assessment there is no rebuttal to the General Counsel's prima facie showing that the interrogation was coercive. I find that the Respondent violated Section 8(a)(1) of the Act by this interrogation.

d. *Thomas Wright—April 25*

Wright also testified concerning an April 25 incident where he, fellow employee Paul Bird, and Jerry Jones were in the assembly area. Jerry Jones walked up to them and asked: ''What do you think about the Union fellows?'' Wright states he did not reply and Bird said he would rather not say. Jones then walked away.

Jones denied this or any similar conversation took place. Employee Bird, who still works for the Company, denied that Jones had interrogated the men about the Union on that occasion, or that Jones had ever solicited his views of the Union. Based on the demeanor of the three witnesses when testifying about this alleged interrogation, I credit the denials of Bird and Jones in this instance. I find that the General Counsel has not proven this allegation by a preponderance of the evidence.

4. Removal of a calendar

The complaint alleges that in early May the Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a rule prohibiting the display of union insignia on the work floor. The Company denies any such rule was ever in effect.

Some men in the plant displayed calendars in their work areas that pictured scantily clad women. The owners were chastised about this when a female customer, Teresa Ranby, visited the plant. According to Jones and Farmer, Ranby suggested the Respondent was inviting sexual harassment complaints by permitting the calendars. They decided to have the offending calendars taken down. While the date is not clear from the record, in late 1993 or early 1994, all such calendars were ordered removed. During the first part of 1994, however, new calendars began appearing in the shop. Again the order was given to remove the calendars.

One of the newly displayed calendars was on a bulletin board next to the saw machine. The bulletin board is used primarily for posting saw orders. This calendar was apparently taken down in May after it had been up about 2 weeks. Some testimony was presented that an additional reason for the removal of this particular calendar was because it covered part of the saw orders that were on the bulletin board. Of all the calendars removed, only this one had a union sticker on it—a small one placed on the body of one of the pictured women.

Throughout the election campaign the Respondent was lenient, even cooperative, in allowing union materials in the plant. The Respondent authorized union supporters to use one-half of the company bulletin board for their literature. A long lunchroom counter regularly contained union publications that were not removed by Respondent. Employees placed union stickers on such things as toolboxes, thermos jugs, welding masks, the timeclock, and the walls.

The special circumstance surrounding the removal of this solitary union emblem contravenes a finding that the Act was violated. Respondent's tolerant policy of allowing the display and distribution of union materials is consistent with its argument that there was no targeting of the singular sticker for removal. It is also consistent with a desire to avoid sexual discrimination complaints that all ''girlie'' calendars would be removed. Importantly, the Company did not prohibit the sticker from remaining on the bulletin board by itself. Nor do I find that a rule was promulgated and maintained which prohibited the display of union insignia. I, therefore, conclude there was no violation of Section 8(a)(1) by indirectly causing the single sticker to be removed because of its fortuitous attachment to the offensive calendar.

5. The list of company supporters

Breeden testified that on or about May 13 he was with Jerry Jones in Jones' office. Jones showed him a list with some employees' names which Jones said were procompany employees. Breeden was allegedly asked if anyone else should be on the list and he told Jones that Brian Davis' name should be added.

Jones denied ever having such a conversation with Breeden. He also denied interrogating employees generally about workers' union activities or how they might vote.

Jones was convincing as a witness. He testified at length as to the time and expense that had been spent by Respondent on hiring lawyers to advise the Company on staying within the law during the campaign. Jones' demeanor was that of someone who was doing his best to tell the truth and answer questions directly. Breeden was generally found to be an unreliable observer of events. I credit Jones' denial and shall dismiss this allegation of interrogation.

Paragraph 7(g) of the complaint additionally alleges that, on or about May 13, Jerry Jones threatened employees with loss of jobs if they selected the Union to represent them. In his brief counsel for the General Counsel asserts that this threat was made during the same May 13 conversation when Jones allegedly told Breeden ''he planned to downsize the Company.'' (G.C. Br. pp. 3, 33.) In support of this contention pages 33–34 of the transcript are cited. My reading of that reference does not disclose any mention of Jones making a statement about downsizing. I find there is no evidence to support the allegation asserted in paragraph 7(g) of the complaint. As noted, I credit Jones' denial of any such conversation.

6. Farmer's discussion of bargaining

Larry Breeden states that on the day of the representation election, May 20, he was putting shingles on the outside of the washroom. Also present were employees Jim Kelly and Robert Akers. Eddie Farmer approached them and asked if they had any questions about the Union. According to Breeden, Farmer then

> made it plain that he couldn't tell us nothing about the Union, because it was a lay down period or something, but if we had some questions he could answered [sic] them. . . .

Breeden remembered Akers asking what would happen if the Union won the election. Farmer said all Respondent had to do:

> was to negotiate one time in good faith at a decent hour, and when they was going to do that, and most likely what the Union would ask for a punch off list, whatever that is, and that they would break off talks immediately and tell them to strike, and when they struck the striking employees would be replaced immediately.'' [Tr. 36.]

Jim Kelly was asked if Farmer had ever wanted to know if he had any questions about the Union. He did recall one instance when he was working outside the plant when Farmer asked him that question. He replied that he did not have any questions. Kelly was not asked if any further statements were made. Akers did not testify.

Farmer admitted on the day of the election he did ask employees if they had any questions. He recalled Akers asking what would happen if the Union came in. He told Akers they would set up a bargaining committee and bargain. ''If we bargained and settled and come to agreement, they would go to work. If not, that there would be vote to strike or not. At that time, if they struck, and it wasn't over—because of safety, but yet due to money, we could hire replacements or part-time people to continue the plant running.'' He denied saying the Company would have to bargain one time, the Union would demand a checkoff which would cause a strike, and the employees would be permanently replaced.

Farmer impressed me by giving a detailed and unrestrained version of his statements that day. In contrast, Breeden's demeanor and his abilities to accurately recall this event did not impress me as being an accurate recollection of what happened. I credit Farmer's version of what was said. I find that Respondent did not violate the Act by the statements Farmer made.

7. Discussion of Kelly's ballot

Larry Breeden testified that he remembered a conversation with Jerry Jones in his office. He first recalled the incident was June 27. He later recalled the conversation to be about a week after the May 20 election. Just the two men were present. Jones asked him how he and his friend Jim Kelly had voted in the election. Breeden told Jones that he was a no vote and he guessed that Kelly had also voted no. Jones replied that if the votes came back one-on-one he would know how they had voted and he would skin Jim Kelly alive. Breeden testified he thought Jones was kidding when he made the remark.

Jones recalled a somewhat similar incident, but placed it on the day of the election. He remembered Breeden coming to the office after he had voted and reporting that his and Jim Kelly's votes had been challenged. Breeden volunteered that he voted for the Company. He also opined that he guessed Kelly had also voted in favor of the Respondent. Jones admitted that he said in jest, ''Well I'll skin him alive if he didn't.'' Jones remembered both men then laughed at the remark.

I credit Jones' version as being the more accurate as to the timing and the content of the conversation. I find that Jones did not interrogate Breeden, but rather the employee volunteered the information about the votes. However, simply because Jones' remaining statement was made in jest does not insulate it from being a violation of Section 8(a)(1). It implies that the Respondent would consider an employee's lack of support against the Union in an unfavorable light. I find the injudicious admitted statement about skinning Kelly alive constitutes an implied threat and thus violates Section 8(a)(1) as alleged. *Natico*, 302 NLRB 668, 689 (1991); *Champion Road Machinery*, 264 NLRB 927, 932 (1982); *Ethyl Corp*., 231 NLRB 431, 433–434 (1977).

C. *The Alleged Violations of Section 8(a)(3) of the Act*

1. Melvin Elwood Goad

Melvin Goad is alleged to have been illegally discharged on or about April 15 and not reinstated until June 24. The Company denies it discharged Goad and asserts he resigned his employment.

Goad's union activities consisted of signing the Union's representation petition and telling his supervisor and brother, Robert Goad, that he believed the Union would help the employees.

Melvin was injured in a lawnmower accident at home on April 13. He did not call Respondent the next day to report his inability to work. He did call the Respondent on April 15 to tell brother Robert that he had broken some ribs. Within a few days he telephoned again and talked to Robert. They did not discuss any date that Melvin would return to work. Because Melvin did not keep in contact, Respondent asked Robert to attempt to locate Melvin. Robert was initially unsuccessful as Melvin changed residences, had no telephone, and did not tell Robert where he was living. However the two brothers did see each other outside of work on occasion. Robert knew that Melvin was continuing to recover from his injuries.

On May 20 Melvin went to the Respondent's plant to vote in the representation election. His name was not on the *Excelsior* voting list and his vote was challenged by the Board agent conducting the election. While at the plant Melvin had Cindy Jones fill out some health insurance papers concerning his injuries. They had no discussion about his return to work. A month later, on June 17, Melvin Goad's doctor released him to return to work. Melvin went to the plant and talked with Jones and Farmer about returning to work. He was told his paper from the doctor was not the full release required for reemployment. Goad obtained an unconditional release from his physician and returned to the plant on Monday, June 20. Again Jones and Farmer talked to Melvin. It was explained that they were concerned about his failure to keep the Company informed of his status during his illness. They told him they had considered that he had quit. Melvin denied that he had quit.

Melvin was rehired after he signed a letter stating: ''We accordingly treated your extended and unauthorized absence as a resignation effective your last day of work.'' (Emp. Exh. 8.) As mutually agreed Goad then went to work on Friday, June 24. Melvin worked only 1 day and then accepted a job at another employer. He left the Respondent's employ without informing the Company that he was quitting.

The Respondent introduced an exhibit (Emp. Exh. 21) which listed the hire and termination dates of all employees since November 1, 1993. In that document the Respondent listed Melvin Goad's termination date as July 1, 1994. The variance in the positions taken by Respondent as to how they viewed Melvin's status was not satisfactorily explained.

General Counsel has the initial burden of establishing a prima facie case. This must be sufficient to support an inference that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing, and employer animus. Once such prima facie unlawful motivation is shown, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, General Counsel ''is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee['s] protected activities.'' *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). ''A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.'' *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982).

There is no doubt that the Company knew of Melvin's serious injuries and that it was interested in finding out about his ability to return to work. The Company never informed Melvin he was discharged. On the contrary, Respondent eventually assumed he had quit. I find that the Company was mistaken in this assumption. There is no evidence Melvin quit. As soon as he recovered from his injuries he sought to return to his job.

Goad was irresponsible in not reporting his progress to the Respondent. That the Respondent would be concerned by this behavior is reasonable. Despite its mistaken belief that Melvin had quit, the Respondent did not seize upon his injuries to rid itself of him. Rather the Company acquiesced in his wishes and employed him when he asked. The only condition was that he be considered a new employee (without cut in pay). The Company's letter also admonished him that he could not come and go as he pleased. (Emp. Exh. 8.)

Of course, the critical question is did Respondent discriminate against Melvin because of his union activities. The answer to that question is no. The preponderance of the evidence does not show that the Respondent mistreated Goad because of his minimal union activities. Respondent has rebutted the General Counsel's prima facie case and I find the Company did not violate Section 8(a)(3) of the Act by its mistakenly assuming Melvin had quit. The remaining issue of whether Goad was eligible to vote in the election is a separate issue discussed below in the section on challenged ballots.

2. Tim and Jay Puckett

The Government alleges that brothers Tim and Jay Puckett were constructively discharged when they quit work in May. The assertion being they were forced to quit because of a layoff announced by the Respondent. The Company's position is the men quit voluntarily and the layoff was not motivated by employees' union activities.

a. *The brothers' union activities*

Jay Puckett was a leader in the union movement at the Company. He was the person who contacted the Union on March 14. He coordinated the circulation of the Union's petition for representation. He handed out union stickers to fellow employees and he wore a union T-shirt at work. Jay was the Union's observer at the election. Tim Puckett likewise was a union supporter. He put union stickers on his thermos bottle and his welding hood. He also signed the Union's petition.

b. *Announcement of layoffs*

The Company presented detailed financial evidence that in January 1994 its cashflow was insufficient to sustain the business. Discussions were held with Edward Vance, the Respondent's independent certified public accountant, regarding steps to correct the matter. Respondent actively solicited new business and paid its bills late. Yet it was clear that labor costs were the largest controllable expenses for the Company. Respondent was apprehensive about having layoffs prior to the May 20 election. After the election, however, layoffs and a demotion were implemented.

Supervisor Robert Goad was demoted to being a unit employee and his pay was cut. On May 26 Jones and Farmer held separate meetings with the assembly and welding departments. Employees were told that there were to be partial layoffs with two employees taking 3 days off each week. The employees were told the length of time the partial layoffs would occur was uncertain but they could last a couple of weeks to a month. The employees were told that new business was anticipated. Nonetheless, Tim Puckett quit the next day. Jay Puckett worked until May 31 and then he too quit.

There is a dispute about exactly what was said about how the layoffs would be administered. The Puckett brothers, both of whom attended the welding shop meeting, testified they understood that the two least senior employees in the department would be laid off. Then the following week employees who were next in seniority would take their turn at layoff. Jones and Farmer testified that both meetings were told the two least senior employees would be laid off if there were no volunteers willing to take time off. The two least senior would suffer the layoffs each week, absent volunteers from those with more seniority.

I credit this latter version of what was told to the employees. The most convincing evidence is how the system actually was applied. In the assembly department the two least senior employees were laid off 2 weeks in a row. This happened because there were no volunteers from among the more senior employees. In the third week of layoffs in the assembly department two senior employees did volunteer and were given the partial layoffs that week. Alleged discriminatee Thomas Wright confirmed the Company's version of what was said in the assembly meeting as to how the layoffs would be applied. Two employees volunteered for layoff the first week in the weld department. That department did not have layoffs after the first week because Tim and Jay Puckett had quit and no replacements were hired.

Tim and Jay never did take any layoff days. Tim had high seniority in the welding department. He would not have been involuntarily laid off under the announced method. Jay in fact had seniority that likewise would have protected him. This was determined by the Respondent after the layoff announcement when it was learned there had been a mistake in calculating departmental seniority. This error and its implications however, were not told to Jay before he quit.

The ability of Jay and Tim to accurately remember facts is not good. When Tim was asked about his quitting work he testified that he left without securing other employment first. He said he had gotten in touch with his new employer after hearing the layoff announcement. On cross-examination he retracted that scenario. In fact he had applied for work at his new employer on May 17—9 days before the layoffs were discussed. He testified he did not start work for a week after he left Respondent. On cross-examination he also retracted this statement. In fact he started his new employment the next workday. Tim had told a fellow employees before the election if things did not work out with the Union that he could not stand to work for Respondent anymore.

Jay Puckett likewise had trouble remembering details of events and was not a totally convincing witness. He continued to work until May 31 when he quit. Jay left without talking to anyone about his feelings regarding the layoff. After leaving Respondent he worked at two other employers before he was laid off. He then filed for unemployment compensation. As part of that process he stated in his application and in testimony before a state examiner that he had voluntarily quit work at Respondent. During the unfair labor practice hearing he attempted to recant this admission. Jay sought to explain his responses by saying the person taking the application got the information wrong. He claimed to have told her he was forced to leave work for Respondent because of his union activities. When confronted with his hearing testimony that confirmed his voluntary quit he stated he could not think and his head was not clear when he initially responded to the state examiner's questions. I find Jay's explanation disingenuous and reflective of his testimony as a whole.

Buttressing the Company's economic defense argument that layoffs were necessary is the fact that there has been virtually no new hiring. (Other than the ''rehire'' for a single day of Melvin Goad.) The Company's general financial situation improved during June and payroll costs were reduced by attrition. After the third week of layoffs in the assembly department, there were no further layoffs.

c. *Analysis of the Puckett brothers charges*

The Board continues to assess constructive discharge cases under the standard set forth in *Crystal Princeton Refining Co*., 222 NLRB 1068, 1069 (1976):[4]

> There are two elements that must be proven to establish a constructive discharge. First, the burden imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

[4] E.g., *Lively Electric, Inc*., 316 NLRB 471 (1995).

Additionally, to find a violation the motivation for imposing the onerous condition must meet the *Wright Line* test, supra.

There is insufficient evidence to find that Respondent orchestrated the layoff policy in an effort to force the Pucketts to quit work. The Company presented compelling evidence of its poor financial condition. The need to cut its high labor cost was credibly testified to by the Employer's CPA, Edward Vance. The Company's application of the layoff policy is not suggestive of an attempt to provoke employees to quit. The plan attempted to spread the effect while being mindful of the employees' seniority.

Tim Puckett had unassailable protection against layoff because of the seniority provision of the program. Tim Puckett had already indicated his desire to change jobs by submitting his job application at a new employer's plant and telling a fellow employee he planned on quitting if the Union did not prevail. Jay Puckett was never laid off. He admitted in his unemployment application and testimony his voluntary quit.

The layoffs were not motivated by the employees' union activities. I find that Jay and Tim Puckett voluntarily left the Respondent's employment because they were dissatisfied with their work, that they were not constructively discharged, and that their terminations of employment do not violate Section 8(a)(3) of the Act.

3. Thomas Wright

Wright was hired in February 1993 and assigned to work on the saw. He subsequently was reassigned to work doing grinding and some assembly. In June 1994 when Tim and Jay Puckett quit and Melvin Goad was absent because of his injuries, there was need for a saw operator. This job is a central function because the saw supplies cut materials for the rest of the plant production process. Farmer testified he had to fill the job and selected Wright because he was experienced on the machine. Wright was assigned the job with no diminution of pay. He did not work exclusively on the saw after June 1. His assignments also included assembly, grinding and rebuild as well.

Wright told Supervisor Sarver that he did not like working the saw. At one point he accused the Company of having him work the saw as punishment for supporting the Union. According to Wright, Sarver replied, ''Probably.'' Sarver denied this conjectural reply to Wright's statement.

Sarver was a low-level supervisor who, under Wright's version, was responding to a speculative statement. Even assuming this rendition happened it seems Sarver gave a similarly speculative response. I cannot, however, ... credit Wright over Sarver. Both men seemed equally credible in their testimony. Thus I find that the Government has not sustained its burden of proving by a preponderance of the evidence that the statement was made. *Container Corp. of America*, 277 NLRB 1398, 1400 (1985); *Bethel Homes*, 275 NLRB 154, 157 (1985).

After pondering his displeasure with the saw assignment, Wright decided to quit. His last day was June 15. As he was leaving the plant he talked to Jerry Jones and told him he was resigning. Jones shook his hand and said he hated to hear it.

Wright's decision to quit was a very personal choice. Although he disliked the saw work there is no evidence this labor was in any sense onerous. He continued to do other

work as well. The preponderance of the evidence does not show that Wright's saw assignment was discriminatorily motivated, was ''difficult or unpleasant'' or that the Respondent thereby sought to cause him to resign. In order to find Wright was constructively discharged a contrary conclusion would be necessary for each of these findings. *Crystal Princeton, Wright Line*, supra. I conclude that the Respondent did not put Wright on the saw work in order to force his resignation and that the reassignment did not violate Section 8(a)(3) of the Act.

IV. THE CHALLENGED VOTES

The Union filed the petition in Case 11–RC–6013 in early April. An election, pursuant to a stipulated election agreement, was conducted May 20. The appropriate unit is:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Dublin, Virginia facility including assembly man, machinist, welder, sawman, janitor, tool room attendant, shipping and receiving clerk, maintenance, and laborer classifications, but excluding all office clerical, guards, professional employees, and supervisors as defined by the Act.

The basis for the Union's challenges must be determined by reading the Regional Director's report. The report states the Union challenged two voters, Larry Breeden and James Kelly. The Union asserted that the men ''were employed as contractors and/or did not perform bargaining unit work for the Employer during the cutoff period for eligibility to vote in the election.'' The Petitioner did not offer any other position at the hearing and did not file a posthearing brief in the instant proceeding.

The Board agent conducting the election challenged three voters, including Melvin Goad, because their names did not appear on the *Excelsior* voting list. Of these three challenges only the vote of Melvin Goad was contested.[5]

Excluding challenged ballots, nine votes were cast for and nine votes against union representation. The remaining three unresolved challenged votes are sufficient to effect the results of the election. I recommend that the challenges to all three ballots be overruled and the votes counted in determining the results of the election.

A. *The Union's Challenges*

The Union's contention that Breeden and Kelly were not employed by the April 7 eligibility date for voting in the election is without merit. The evidence of timecards, paychecks, W-2 forms, state employment filings, and the record as a whole shows that Breeden and Kelly started work for Respondent on April 4. I find that Breeden and Kelly were employed by the Respondent on the April 7 eligibility cutoff date.

Breeden and Kelly's commenced their employment on Monday, April 4, by working the week at Respondent's Parrott facility dismantling painting equipment that was being transferred for permanent use at the Dublin plant. No employees were regularly stationed at Parrott and there was a need to eliminate that facility.

After the first week Breeden and Kelly worked exclusively at the Dublin plant. The men constructed a paint facility, did a washroom expansion, built a delivery ramp, cleaned storage space, built a doorway, and painted the plant. The Company provided the tools, materials, and necessary building permits. When weather or Respondent's requirements dictated, the men would work at production jobs inside the plant. They were assisted by other plant personnel on some projects including roofing, welding, and installing the paint monorail system. Breeden and Kelly understood they had been hired to do maintenance. They were supervised mainly by Farmer, but were guided by departmental supervisors when doing specific production work.

The unit description includes maintenance and laborer employees. As noted, Breeden and Kelly regularly performed maintenance and laborer type work as well as occasional production tasks. The evidence shows they were paid hourly rates and received company benefits in accordance with the same standards as other unit employees. I find that Breeden and Kelly were not working as independent contractors. They were the only maintenance employees working in the plant. As such they were eligible to vote in the May 20 election. I conclude that the Union's challenges to Breeden and Kelly's votes be overruled, and that their ballots be opened and counted in determining the results of the election.[6]

[5] The Board agent conducting the election challenged the votes of Andy Hall, Aaron Hogston, and Melvin Goad. Petitioner contended that each of these individuals had been discharged in violation of Sec. 8(a)(3) of the Act. Thus their eligibility depended on whether they had been unlawfully discharged. As noted in fn. 2, the 8(a)(3) allegations naming Aaron Hogston and Andy Hall were deleted from the complaint by an amendment from the General Counsel. It was explained that neither Hall nor Hogston wanted to pursue their claim. As a result no evidence was offered regarding them. I, therefore, conclude the challenges to Hall and Hogston's votes shall be sustained.

[6] During the hearing the Union elicited evidence concerning an alleged $1500 cash payment made in June to Larry Breeden. A wealthy acquaintance of Breeden, Dick Matson, testified he received a phone call from Jerry Jones. Jones asked him to do a favor and tell Jones' employee Breeden to look for something in his mailbox. Matson allegedly passed the message along to Breeden either in a phone call or a note. Matson supposedly did not tell Breeden what was to be in the mailbox or the source. The following day Breeden opened his mailbox and discovered an unmarked envelope containing $1500 in cash. He states he did not know the reason he had received it or the source. He then allegedly paid $500 of the money to his friend Jim Kelly by check. His sister supposedly had written the check for him because he did not have a checking account. The Union did not define the purpose of this testimony. I am assuming it was offered to imply that Breeden and Kelly were paid by Respondent to buy their support against the Union and/or that it was a supplemental payment consistent with the theory that the men were working as independent contractors and not employees. Regardless of the purpose, I find the purported incident is incredible. Breeden was the Government's witness and designated party representative. He denied any knowledge of why, or by whom, the mystery payment was made. Breeden, despite many weeks of time during the course of the hearing, was unable to produce the canceled check he says he gave to Kelly. Jim Kelly denied knowing about or ever receiving any portion of such a payment. I found Kelly to be an unbiased and forthright witness. I credit his denial. The testimony of Matson is deemed incredible. The record as a whole establishes Matson had a grudge against Jones. Because of their demeanor when testifying about this event I do not credit Breeden or Matson. I conclude the payment never took place.

B. *The Board Challenged Vote*

Melvin Goad's vote was challenged by the Board agent because his name was not on the *Excelsior* list. The Employer takes the position that Goad quit his employment prior to the election as discussed above. The Union asserts that he was eligible to vote as he was never notified that he was terminated, nor did he quit.

The Board's policy relative to the voting eligibility of persons who are absent from work due to sickness is well established:

> An employee absent from work due to illness or injury is presumed to retain both employee status and voting eligibility, unless the party seeking to rebut that presumption shows that the employee resigned or was discharged. *Thorn Americas, Inc*., 314 NLRB 943 (1994.) Citing *Red Arrow Freight Lines*, 278 NLRB 965 (1986).

As detailed in the discussion of the 8(a)(3) allegations, Melvin Goad was clearly slipshod in keeping the Company advised of his status. Nonetheless, the Respondent was admittedly aware that he had suffered serious injury and was logically going to be off work for an extended period. The Company never terminated Goad. Rather the Company contends that he quit in April. (Yet Emp. Exh. 21 lists Goad as an employee from June 14, 1993, until July 1, 1994.) The record as a whole does not support that Goad had quit before the election. Goad was desirous of returning to work for Respondent. When he recovered from his injuries he went to Respondent for his job.

I find that Goad neither quit nor was discharged prior to the May 20 election and that he was absent from work due to a legitimate physical injury. I find that he retained his employee status with Respondent through the May 20 election date. Additionally, Goad worked at the unit job of a sawman and was eligible to vote in the election of May 20. I, therefore, find that his challenged ballot shall be opened and counted towards the results of the election.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By warning or impliedly threatening employees about participating in union activities, giving the impression employees' union activities were being surveilled, and coercively interrogating employees, the Respondent violated Section 8(a)(1) of the Act and committed unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. The General Counsel has failed to prove that the Respondent unlawfully discharged employees Melvin Goad, Tim Puckett, Jay Puckett, or Thomas Wright because of their union activities.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Appalachian Machine and Rebuild Company, Dublin, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning or impliedly threatening employees to be careful because they participate in union activity and giving the impression of surveillance of employee's union activities.

(b) Coercively interrogating any employee about union activities or union sympathies.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Dublin, Virginia, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED in Case 11–RC–6013 that the challenges to the ballots of Andy Hall and Aaron Hogston be sustained. The challenges to the ballots of Larry Breeden, Jim Kelly, and Melvin Goad are overruled, and their ballots shall be opened and counted. The Regional Director shall thereafter prepare and serve upon the parties a revised tally of ballots and issue an appropriate certification.

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[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten or warn you about participating in union activities.

WE WILL NOT imply that we are surveilling your union activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

APPALACHIAN MACHINE AND REBUILD COMPANY